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Supreme Court of the United States

OCTOBER TERM, 1966

No. 1206

305 EAST 43RD STREET CORPORATION,

Petitioner,

against

ESKIL L. KARLSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF 305 EAST 43RD STREET CORPORATION

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Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

305 East 43rd Street Corporation,

Petitioner,

against

Eskil L. Karlson,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF 305 EAST 43RD STREET CORPORATION

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, 305 East 43rd Street Corporation, prays that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit, and the denial of a petition for a rehearing or rehearing in banc, affirming a judgment entered in the United States District Court for the Southern District of New York on March 29, 1966, in favor of respondent, Eskil L. Karlson, against petitioner, 305 East 43rd Street Corporation, in the amount of $150,000, upon a general jury verdict in an action for personal injuries sustained in a building located in the City of New York.

Motions of petitioner, for judgment n.o.v., pursuant to Rule 50(b), and for a new trial, pursuant to Rule 59 of the

Federal Rules of Civil Procedure, were denied by the District Court without opinion (Rec., Volume I, pp. 31a-32a).

The opinion of the Court of Appeals affirming the judgment of the District Court, is reported at 370 F. 2d 467 and a copy is appended hereto as Appendix B.

Jurisdiction

The judgment of the Court of Appeals affirming the judgment of the District Court was entered on January 4, 1967. A copy is annexed hereto as Appendix C. The orders of the Court of Appeals denying the petition for rehearing with a suggestion for rehearing in banc were entered on February 2, 1967. Copies of said orders are annexed hereto as Appendices D and E.

Jurisdiction to review the judgment by writ of certiorari is invoked under 28 U.S.C. 1254(1) and 2101(c), as well as Rule 19.1(b) of this Court.

Questions Presented for Review

I

Whether a Federal Court in a diversity action involving liabilities and immunities of a property owner may impose liability for an injury occurring on the owner's premises without sanction in State law and contrary to State legislation.

Comprehended within this question in the present case, are the following questions:

1. Whether in a diversity action a Federal Court may disregard the clear and express language of a State Statute and interpret such Statute in a manner without sanction in State law.

2. Whether a Federal Court, in a diversity action, may completely repudiate State law on the question of proximate causation of an injury.

3. Whether, in the trial of a diversity action, a Federal Court may, in complete defiance of State law and without any sanction in Federal law, submit to a jury evidence of recent repair where there was no issue of control of the premises involved.

4. Is not a Federal Court, in a diversity action, required to apply State law principles respecting burden of proof on the issue of contributory negligence?

Statutes Involved

New York City Charter, Chapter 27, Section 666, adopted by referendum November 3, 1936, effective January 1, 1938.

Administrative Code of the City of New York, Chapter 929, Laws of 1937, Title C—Building Code, Article 1, Sections C26-2.0 and 3.0 and Article 14—Elevators—Sub-Article 2, Section C26-844.0-a.1.-c.2 and Sub-Article 8, Sections C26-1171.0 and 1172.0-a.

The Greater New York Charter, laws of 1901, Chapter 466 as amended by New York laws of 1916, Chapter 503, Section 718a.

Labor Law of the State of New York, Section 255.

The text of these Statutes is set forth in Appendix A.

Statement of the Case

The basis of Federal jurisdiction in the Court of first instance is diversity of citizenship between respondent, a citizen of the state of Connecticut and petitioner, a New York corporation, in an action for personal injuries demanding damages in excess of the jurisdictional amount of $10,000 exclusive of interest and costs.

Petitioner is the corporate owner of a five-story building located at 305 E. 43rd Street, New York City. Respondent was an employee of Haskins Laboratories, a tenant who had occupied the third, fourth and fifth floors of said building since about 1940 (Rec. Vol. I, p. 234a). The building was constructed in 1897 and was equipped with a single manually operated elevator which had been installed in 1920 (Rec. Vol. I, p. 150a) and which had been continued in use since then without significant alteration (Op. App. B., p. 29). There are still many thousands of such elevators in use in the City of New York (Rec. Vol. I, pp. 230a-231a).

The door to the elevator shaft was immediately opposite and faced the street door entrance to the building, over which there was a large three-panelled glass transom. To the right of the elevator shaftway as it is approached from the entrance to the building, there was a staircase leading to the upper stories. During normal business hours from Monday to Friday, petitioner supplied an operator for the elevator. On week-ends, because Haskins Laboratories frequently had ocasion to use the building, some of its employees, not including the plaintiff, had obtained permission to operate the elevator themselves. For this purpose a key to open the shaftway door was kept, over the week-end, under the bottom step of the staircase (Op. App. B., p. 30; Rec. Vol. I, pp. 56a, 95a-96a, 274a, 236a, 249a, 263a-264a, 276a).

On Sunday, October 8, 1961, when there was no employee of petitioner on the premises, a Haskins employee by the name of Epstein who had been authorized to use the elevator, entered the building and removed the elevator car to an upper floor using the key under the staircase to obtain entrance to the elevator. Before removing the car, however, he replaced the key under the staircase (Rec. Vol. I, pp. 248a-261a). Later in the day respondent entered the building, obtained the key from under the staircase, and proceeded to open the locked elevator door. Without taking precautions of any kind to ascertain that the car was

present, he proceeded to step into the car and fell down the shaft one story to the basement floor (Rec. Vol. I, pp. 98a-100a, 102a-103a).

At the time, natural daylight coming through the transom above the street door provided sufficient light for him to obtain the key, to insert it in the keyhole of the door, to see the floor of the vestibule in front of his feet and generally to observe what he was doing (Rec. Vol. I, pp. 55a-56a, 96a-97a). The elevator car was equipped with an accordian type metal gate which, when the elevator was not in use, would be pushed back in a folded position, and the upper half of the elevator car had light painted grille work which the plaintiff admittedly could have seen if the car had been there. The plaintiff did not see this grille work, nor did he observe the floor of the elevator car, nor did he feel around the door frame for the gate, as had Epstein before him (Rec. Vol. I, p. 255a). He admitted that at the time there was nothing to obstruct his vision (Rec. Vol. I, p. 103a).

The elevator was not and had never been equipped with an interlocking device which would have prevented opening the elevator door unless the car was at the landing. The Trial Court instructed the jury that it could consider as evidence of negligence the failure of the petitioner to comply with a rule of the New York State Board of Standards and Appeals requiring that elevators be equipped with an interlocking device "which shall prevent the opening of a hoistway door from the landing side unless the car is standing at that landing" (Rec. Vol I, pp. 13a-14a).

By the provisions of Chapter 929 of the Laws of 1937, the construction and maintenance of elevators in the City of New York is governed exclusively by the Administrative Code of the City of New York except as modified by the City Board of Standards and Appeals (App. A, Sec. C 26-1171.0-b., p. 25). By that Code, elevators legally installed prior to January 1, 1938 may be used without being

reconstructed. The only requirement respecting such elevators is that they "be maintained by the owner in a safe operating condition" (App. A, Sec. C26-844.0-c2., p. 25). The elevator in question admittedly conformed to existing law when it was installed in 1920. There had never been a violation placed against the elevator during its present ownership since 1939 (Rec. Vol. I, pp. 261a, 267a-270a).

The Court of Appeals in disregard of the clear legislative mandate of the New York State Legislature and in contravention of State case law has sustained the charge of the District Court and thus imposed upon a New York City property owner a responsibility from which he is exempt under State law.

At the trial the District Court allowed the respondent, over strenuous objection by petitioner (Rec. Vol. I, pp. 151a-157a), to introduce evidence that within a few days after the accident, the defendant had installed an interlocking device on the elevator door so that it could not be opened unless the car was at the landing, and to point out the device on pictures which had been introduced in evidence for the limited purpose of showing the general scene of the accident (Rec. Vol. I, pp. 217a-219a). The introduction of this evidence was in direct conflict with well settled New York State law, has no support or sanction in Federal law and, is in conflict with the decision of this Court in *Columbia & P.S. R.R.* v. *Hawthorne*, 144 U. S. 202 (1892).

Reasons for Granting the Writ

1. In this diversity action involving an injury occurring in a building within the City of New York, the Court of Appeals for the first time for any Court sitting within the State of New York has, by pure judicial fiat, made applicable to elevators installed in buildings within the City of New York prior to 1938, the rules of the New York State Board of Standards and Appeals.

This has been done in clear disregard of the language of the Administrative Code enacted by the Legislature of the State of New York by the New York Laws of 1937, Chapter 929, and in defiance of the legislative mandate of the New York Laws of 1916, Chapter 503, Section 718a. Section 718a of the Laws of 1916 gave exclusive jurisdiction to the New York City Board of Standards and Appeals in respect of rules and regulations affecting the construction, alteration and structural changes in elevators in the City of New York and mandated that its rules and regulations "shall take the place of the industrial code and of any rules or regulations of the labor department relating to the same subject matter."

The decision of the Court of Appeals in this case is an unabashed exercise of judicial legislation in a field not within the competence of a Federal Court. The effect of the decision is that a New York City property-owner has been held liable in the not unsubstantial amount of $150,000 for the violation of a rule of the State Board of Standards and Appeals which is wholly inapplicable to building owners within the City of New York.

By New York Laws of 1937, Chapter 929, the Legislature of the State of New York enacted the Administrative Code of the City of New York of which Title C, known as the Building Code, applies to "All matters, affecting or relating to the construction, alteration, demolition, or removal of structures erected or to be erected in the city" (App. A, Sec. C26-2.0, pp. 23-24). By Section C26-3.0, the purpose of Title C is stated to be "to provide standards, provisions and requirement for safe and stable design, methods of construction and sufficiency of materials in structures constructed, or demolished, after January first, nineteen hundred thirty-eight, and to regulate the equipment, maintenance, use and occupancy of all structures and premises" (App. A, p. 24).

By Section C26-844.0, it is stated that "The construction, maintenance, operation, inspections and tests of elevator

* * * device installations shall be as provided in this article and other applicable sections of this title, and the rules of the board, except as otherwise provided in subdivision c of this section." By subdivision c.2, of this Section, it is specifically provided that "Equipment legally installed prior to January first, nineteen hundred thirty-eight may be used without being reconstructed. Such elevators shall be maintained by the owner in a safe operating condition" (App. A. p. 25).

The New York City Charter, Chapter 27, provides by Section 666-3, that the New York City Board of Standards and Appeals shall have power: "To make, amend and repeal rules and regulations for the enforcement of those provisions of the labor law and other laws which relate to the construction, alteration, structural changes in * * * elevators in * * * all buildings within the city, which shall take the place of the industrial code and of any rules and regulations of the department of labor of the state of New York relating to the same subject-matter." By Section 666-4, the City Board of Standards and Appeals is given the power "To exercise exclusively, with respect to buildings situated within the city, the same powers as are exercised by the department of labor of the state of New York elsewhere in the state" (App. A, p. 23).

The Courts below have not imposed liability upon the ground that petitioner failed to comply with any of the provisions of the Administrative Code relating to elevators within the City of New York, which contain similar provisions to those contained in the rules of the New York State Board of Standards and Appeals charged to the jury (Administrative Code, Secs. C26-902.0 and 903.0). To have so held would have been to fly in the face of a considerable body of decision in New York, including the United States Court of Appeals for the Second Circuit, giving effect to the prohibition against the application of Administrative Code provisions to structures erected or

elevators installed prior to 1938: *Florentine* v. *Church of Our Lady of Mt. Carmel*, 340 F. 2d 239 (1965); *Moran* v. *Abercrombie & Fitch Company* (A. D. 1st Dept.), 22 A. D. 2d 779, 254 N.Y.S. 2d 33 (1964); *Fleming* v. *Fifth Avenue Coach Lines, Inc.* (A. D. 1st Dept.), 23 A. D. 2d 726, 257 N.Y.S. 2d 666 (1965). The Court of Appeals, rather, has justified the action of the Trial Court in holding that the elevator was subject to the State Board rules by a devious and specious process of reasoning which entirely disregards the fact that it is the duty of a federal court to apply state law as it is, and that it is not within its province to fashion state law as it believes it should be. This, in essence, is the principle of *Erie* v. *Tompkins*, 304 U. S. 64. See *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169 (1940); *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 236 (1940).

Where there has been no definitive adjudication by the highest Court of Appeals of the state, the Federal Courts are required to apply state law as enunciated by intermediate Courts of Appeals of the state or even Courts of first instance. *Six Companies of California* v. *Joint Highway District No. 13 of the State of California*, 311 U. S. 180, 188 (1940), *Fidelity Union Trust Co.* v. *Field, supra*, at p. 178 (1940).

To arrive at its result, the Court below gratuitously interpolated into Section C26-844.0. c.2, which exempts equipment legally installed prior to January 1, 1938, from the specific provisions of Article 14 relating to elevators, the words "and maintained" after the word "installed". The same section, with respect to maintenance, merely provides that "Such elevators shall be maintained by the owner in a safe operating condition."

While not referring specifically to Section C26-844.0. c.2 of the Administrative Code, which was an enactment of the New York State Legislature, the Court likened this provision of the Code to an earlier similar provision contained

in the comprehensive rules adopted by the New York City Board of Standards and Appeals relating to elevators in 1931 (Op. App. B, p. 34). At the time the comprehensive rules referred to by the Court below were adopted by the New York City Board of Standards and Appeals in 1931, that Board had been given by subdivisions 3 and 4, Section 718a of the New York Laws of 1916 exclusive jurisdiction with respect to the regulation of elevators within the City of New York. It was specifically provided by subdivision 3 that "All rules and regulations made by the board pursuant to this section, *shall take the place* of the industrial code and of any rules or regulations of the labor department relating to the same subject matter" (App. A, p. 26; Op. App. B, pp. 32-33).

The rules adopted by the City Board in 1931 provided that elevators "legally installed prior to the adoption of these rules may be used without being reconstructed to comply with these rules" (Op. App. B, pp. 33-34). The Court below speciously reasoned that since the City Board had adopted no comprehensive rules prior to 1931, the rules of the State Board of Standards and Appeals adopted in 1923 had become applicable to the elevator in question which was erected in 1920, and that the 1931 exemption accorded to elevators legally installed prior to 1931 should not be interpreted according to its clear language, but as if it were limited to "elevators legally installed and maintained" (Op. App. B, p. 34).

This, the Court below did without any authority or sanction in state law and purely upon its own initiative. Similar provisions of rules of the Building Code of the City of New York then in effect had been held by the New York Court of Appeals to exclude from the specific provisions of the Code, buildings erected prior to its enactment, *McCabe* v. *Mackay*, 253 N. Y. 440, 171 N. E. 699 (1930).

With respect to the present Building Code, it has been specifically held by the Supreme Court of the State of

New York at Trial Term, Bronx County in *Rashid* v. *Weill*, 180 Misc. 815, 46 N.Y.S. 2d 711 (1944), that provisions of the Code relating to retaining walls could not be given effect under the multiple-dwelling law relating to buildings erected after April 19, 1929, since the building had been constructed in 1911. A similar result was arrived at by the Court of Appeals for the Second Circuit with respect to provisions of the Building Code, relating to lighting, in *Florentine* v. *Church of Our Lady of Mt. Carmel*, 340 F. 2d 239 (1965).

There is no decisional law in New York whatever which tends in the slightest to give support to the action of the Court of Appeals in the instant case in making the State Board rules applicable to the elevator involved. In addition, as indicative of the interpretation of the law as understood by the administrative body having control in the area involved, is the fact that no violation was ever placed upon this elevator during the ownership of the building by the petitioner since 1939 (Rec. Vol. I, pp. 267a-270a), although inspection of proper maintenance in accordance with the provisions of the Building Code and the rules of the city Board was required by Section C26-1172.0 four times a year (App. A, pp. 25-26). Moreover, respondent's expert, a former supervising inspector of buildings (Rec. Vol. I, p. 220a) admitted that elevators that had been erected prior to 1931 were not required to have a so-called "parking device" as a matter of rule or regulation (Rec. Vol. I, p. 229a). He also testified that as of 1930, although about 75 percent of the elevators then in use in the city were of the type here involved, about 50 percent of them had no such parking device (Rec. Vol. I, pp. 230a-231a).

As a result of the decision of the Court below, the petitioner, a property owner in the City of New York, has been cast in liability for injuries because of an unwarranted and purely gratuitous imposition upon it of an obligation from which it was immune under state law.

2. It has long been the settled law of New York that for negligence to be a proximate cause of injury, it must be the direct cause in a natural sequence or chain of events without the intervention of the act of any other person which was not reasonably foreseeable. *McLaughlin* v. *Mine Safety Appliance Co.*, 11 N. Y. 2d 62, 181 N. E. 2d 430 (1962); *Rivera* v. *City of New York*, 11 N. Y. 2d 856, 182 N. E. 2d 284 (1962); *Meyers* v. *120th Ave. Corp.*, 9 A. D. 2d 931, 195 N.Y.S. 2d 163, aff'd 11 N. Y. 2d 871, 182 N. E. 2d 291 (1962); *Bolsenbroek* v. *Tully & DiNapoli, Inc.*, 12 A. D. 2d 376, 212 N.Y.S. 2d 323, aff'd 10 N. Y. 2d 960, 180 N. E. 2d 61 (1961); *Morse* v. *Buffalo Tank Corp.*, 280 N. Y. 110, 19 N. E. 2d 981 (1939); *Saugerties Bank* v. *Delaware & Hudson R. Co.*, 236 N. Y. 425, 141 N. E. 904 (1923); *Perry* v. *Rochester Lime Co.*, 219 N. Y. 60 (1916).

In the present case there was a serious question whether, even if defendant was negligent, its negligence was a proximate cause of plaintiff's injury by reason of the intervening act of plaintiff's co-employee, Epstein, in placing the key to the elevator door back under the staircase, where it was available for use by another of Haskin's employees, instead of keeping it on his person when he removed the elevator from the first floor landing.

Petitioner had requested a charge on proximate causation in accordance with New York law and the Trial Court stated that this wold be covered in the charge (Rec. Vol. I, p. 22a, No. 11; p. 26a). However, the charge as given failed to include any charge whatever on proximate causation other than the statement that if "some negligence of the defendant was a substantial factor in bringing about the accident" and "no negligence of the plaintiff contributed to it, then the plaintiff is entitled to recover" (Rec. Vol. I, p. 13a). The Court specifically withdrew from the jury any consideration of the conduct of Epstein on the issue of proximate causation saying that if they found that the plaintiff was not guilty of some contributory negligence and that some negligence of the defendant was a

substantial factor in bringing about his injuries, "the fact that Mr. Epstein may have been negligent and that this negligence was a substantial factor in bringing about the injuries, does not exonerate the defendant from liability" (Rec. Vol. I, p. 15a). Due exception was taken (Rec. Vol. I, pp. 18a-19a). The Court of Appeals, in passing upon this claim of error, dismissed it summarily with the mere comment, "nor was there error in the instructions on the subject of causation. No particular formula is required".

New York has never adopted the substantial factor doctrine of proximate causation, but on the contrary has in effect rejected it. This is eminently apparent from its decisions in the cases of *Rivera* v. *City of New York* and *McLaughlin* v. *Mine Safety Appliances Co.*, both *supra*, decided in 1962. In *Rivera*, the Court wrote as follows (11 N. Y. 2d at p. 857):

> "It is clear in the present case that the condition of the bathtub's plumbing was not the proximate cause of the accident. The hot water created the specific injuries for which damages were sought and determined the gravity of the consequences resulting from the accident, but it did not cause the intervening act which was not foreseeable. (Ranney v. Habern Realty Corp., 281 App. Div. 278, 119 N.Y.S. 2d 192, aff'd 306 N. Y. 820.) The accident was caused by the slipping of a wet boot while the child balanced on the curved edge of the bathtub. (Lefkowitz v. Greenwich Sav. Bank, 293 N. Y. 711, 56 N. E. 2d 729)."

In *McLaughlin*, the New York Court of Appeals specifically held that it was reversible error for the Trial Court to fail to instruct the jury that the conduct of a third person could be an intervening cause which broke the chain of causation where plaintiff sustained injury from the application of heat blocks without additional insulation. Holding that there was sufficient evidence to sustain the jury's finding of negligence upon the ground of the rea-

sonable foreseeability of injury from the failure to give adequate warning of the need for additional insulation, the Court reversed for the failure to give an appropriate charge on proximate causation, saying (11 N. Y. 2d at p. 69):

> "But the true problem presented in this case is one of proximate causation, and not one concerning the general duty to warn or negligence of the distributor."

And (at p. 71):

> "In short, whether or not the distributor furnished ample warning on his product to third persons in general was not important here, if the jury believed that Traxler had actual notice of the danger by virtue of his presence at demonstration classes or otherwise, and that he deprived the nurse of her opportunity to read the instructions prior to applying the blocks. * * *"

In both of the cited cases, the claimed negligence was obviously a "substantial factor" in bringing about plaintiff's injuries; yet the New York Court of Appeals held that this was not sufficient to establish proximate causation.

In view of the settled New York law on the subject and the definite pronouncement of the New York Court of Appeals as recently as 1962 in *McLaughlin*, so closely analogous to the present case in principle, the decision of the Court of Appeals affirming the action of the Trial Court in this case deprived the petitioner of the benefit of the trial in accordance with New York Law to which he was entitled.

3. The trial court allowed respondent, over strenuous objection by petitioner (Rec. Vol I, pp. 151a-157a), to introduce evidence that immediately after the happening of the accident, petitioner installed an interlocking device on the elevator door (Rec. Vol. I, pp. 217a-218a). Counsel

for petitioner had stipulated that he was raising no issue as to possession and control (Rec. Vol. I, p. 151a) and respondent stipulated that he was making no claim of faulty maintenance (Rec. Vol. I, p. 266a). The only purpose of the introduction of such testimony could have been for its prejudicial effect (See the last question on p. 217a, Rec. Vol. I). It is well settled in the law of New York that evidence of "changes or repairs made in an appliance, structure or machine which caused an accident is not an admission of negligence in having maintained the appliance, structure, or machine in its former condition" and may not be admitted as evidence. *Dougan* v. *Champlain Transportation Co.*, 56 N. Y. 1 (1874); *Corcoran* v. *Village of Peekskill*, 108 N. Y. 151 (1888); *Getty* v. *Town of Hamlin*, 127 N. Y. 636 (1891); *Hadges* v. *New York Rapid Transit Corporation*, 259 App. Div. 154, 18 N.Y.S. 2d 304 (1st Dept., 1940); *Danielson* v. *City of New York*, 283 App. Div. 1019, 131 N.Y.S. 2d 136 (1st Dept., 1954); *Del Riccio* v. *Montwill Corporation*, 16 A. D. 2d 971, 230 N.Y.S. 2d 501 (2nd Dept., 1962).

In *Columbia & Puget Sound R. Co.* v. *Hawthorne*, 144 U. S. 202 (1892), this court reversed a judgment in favor of plaintiff where such evidence was admitted, saying:

> "But it is now settled, upon much consideration, by the decisions of the highest courts of most of the states in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant."

The only exception to this principle in New York law is that evidence of subsequent repair may be admitted in

cases where there is an issue between a landlord and a tenant as to the landlord's retention of control of the leased premises. *Scudero* v. *Campbell*, 288 N. Y. 328, 43 N. E. 2d 66 (1942); *Antonsen* v. *Bay Ridge Sav. Bank*, 292 N. Y. 143, 54 N. E. 2d 338 (1944); *Noble* v. *Marx*, 298 N. Y. 106, 109-110, 81 N. E. 2d 40 (1948). It was admitted in the present case that petitioner was the owner of the building. It was conceded in the pretrial order that it had "maintained" the elevator and counsel for petitioner stipulated that he was raising no issue of control (Op. App. B, p. 35). Moreover, no issue with respect to petitioner's possession or control of the elevator was ever submitted to the jury.

The only justification for the admission of this evidence given by the trial court or by the Court of Appeals, was that the device appeared on photographs which had been admitted in evidence pursuant to a stipulation in the pretrial order "that the photographs fairly and accurately represent the scene of the accident" (Rec. Vol. I, p. 304a). Use of photographs admitted for the limited purpose of showing the scene of the accident to evidence a repair or change in condition after the accident has been specifically condemned by the Court of Appeals of the State of New York in *Cahill* v. *Kleinberg*, 233 N. Y. 255, 259-260 135 N. E. 323 (1922).

Taken together with the charge that the plaintiff could be found guilty of negligence in not equipping the elevator door with an interlocking device, the testimony of the installation of such a device within a few days after the accident was so clearly prejudicial to the defendant as to have deprived it of a fair trial.

4. As was recognized by the court below in *Tropea* v. *Shell Oil Company* (1962), 307 F. 2d 757 at page 767:

> "The general rule in New York is clear-cut and well established:

> 'A plaintiff who negligently subjects himself or his property to a risk of harm from a defendant's negligence may not recover for injury resulting therefrom, except as the doctrine of last clear chance is applicable.' *Storr* v. *New York Cent. R. Co.*, 261 N. Y. 348, 351, 185 N. E 407, 408 (1933)."

That the plaintiff has the burden of proving that the injury did not result from any negligence on his part contributing thereto is traditional in New York law. Thus, in *Whalen* v. *Citizens' Gas Light Co.*, 151 N. Y. 70, the Court of Appeals for this state in 1896 wrote as follows (at p. 73):

> "It is the well-settled law of this state that, in actions of this character, the absence of negligence on the part of the plaintiff contributing to the injury must be affirmatively shown by the plaintiff, and that no presumption of freedom from such negligence arises from the mere happening of an injury."

Of particular application to the present case are the comments of the Court of Appeals in that case (at p. 74):

> "It is not pretended that anything occurred that momentarily obstructed her vision, and it is difficult to conceive how she could have avoided seeing the obstacle unless she was heedlessly proceeding in utter disregard of the precautions usually taken by careful and prudent people."

As recently as 1962, the New York Court of Appeals in *Nucci* v. *Warshaw Construction Corp.*, 12 N. Y. 2d 16, 186 N. E. 2d 401 wrote as follows (12 N. Y. 2d at p. 19):

> "In the face of a cautious alternative, plaintiff chose to walk with his eyes open (both figuratively and literally) into a condition which he contends *defendants* ought to have foreseen would cause injury, and has

thus impaled himself on the horns of a dilemma, both of which dictate a dismissal of the complaint. (Utica Mut. Ins. Co. v. Amsterdam Color Works, 284 App. Div. 376, 131 N.Y.S. 2d 782, aff'd 308 N. Y. 816; Townes v. Park Motor Sales, 7 A. D. 2d 109, 180 N.Y.S. 2d 553)."

In the present case, there can be no dispute as to plaintiff's conduct. There was no witness to his accident, and his case depends upon his own testimony. On direct examination, he testified that after entering the front door, he proceeded to get the key from underneath the steps; that he had sufficient light to see what he was doing, although he didn't think that he could read a paper there; and that after opening the elevator door, although it was darker in the shaft than in the vestibule, he stepped in, reaching down for the light switch of the elevator car and fell into the shaft (Rec. Vol. I, pp. 55a-56a).

On cross examination, he admitted that the upper half of the elevator car had a light-painted grill work which he should have been able to see if it was there, but didn't see; that he could see the floor of the vestibule in front of his feet, but didn't see the floor of the elevator car; that there was nothing that would have prevented him from seeing what he should have seen; and that he, nevertheless, stepped forward, reaching over for the elevator light switch, and fell into the vacant shaftway (Rec. Vol. I, pp. 98a-103a).

If the light in the vestibule was insufficient to see into the shaftway, then the plaintiff was equally chargeable with contributory negligence in admittedly proceeding into the darkened elevator shaft. This principle is so well established in New York as to be, in effect, Hornbook law. See *Piper* v. *N.Y.C. & Hudson River R. Co.*, 156 N. Y. 224 (1898); *Rohrbacher* v. *Gillig*, 203 N. Y. 413, 417-418 (1911); *Brown* v. *Associated Operating Co.*, 165 App. Div. 702,

151 N.Y.S. 531, 532, aff'd 222 N. Y. 566 (1917); *Bragg* v. *Smilowitz,* 16 A. D. 2d 181, 226 N.Y.S. 2d 755, affd. 12 N. Y. 2d 769, 186 N. E. 2d 566 (1962).

Of particular significance is the *Piper* case wherein, in an action against a railroad company, the Court wrote as follows (156 N. Y. at p. 228):

> "He has the right to rely upon the performance by the railroad company of its duty to exercise the utmost degree of care and skill which human prudence and foresight can suggest in transporting him; but that does not relieve him from the duty of using his own senses of sight, hearing and perception."

Petitioner does not challenge the charge to the jury on the question of contributory negligence, but raises the question as to whether or not under the proof in this case, the plaintiff carried the burden of proof imposed upon him to prove his freedom from contributory negligence. As to this burden of proof, the Appellate Division for the Second Department of the State of New York in *Tornambe* v. *Tornambe,* 16 A. D. 2d 680, 227 N.Y.S. 2d 237, aff'd 12 N. Y. 2d 1003, 189 N. E. 2d 625 (1963), stated the principle applicable in New York courts as follows:

> "Plaintiff failed to show, either by direct proof or by circumstantial evidence, her freedom from contributory negligence. No presumption that she was free from blame arises from the mere happening of an injury and from proof that defendant was, or might have been negligent (Weston v. City of Troy, 139 N. Y. 281, 282, 34 N. E. 780, 781). When, as in this case, circumstances point as much to the negligence of of the plaintiff as its absence, or point in neither direction, a nonsuit should be granted (Wiwirowski v. Lake Shore & Mich. So. Ry. Co., 124 N. Y. 420, 425, 26 N. E. 1023, 1024)."

In *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437 (1959), this Court said (at p. 446):

> "Under the *Erie* rule, presumptions (and their effects) and burden of proof are 'substantive' and hence respondent was required to shoulder the burden during the instant trial."

This has been held to apply specifically to plaintiff's burden of proving his freedom from contributory negligence: *Palmer* v. *Hoffman*, 318 U. S. 109, 117 (1942).

There has been no suggestion in this case that there is any difference between federal law and New York law as to the sufficiency of evidence to present a jury question, but the Court of Appeals for the Second Circuit has at least twice held that the standards under New York State law and federal law are substantially identical, *Presser Royalty Company* v. *Chase Manhattan Bank*, 272 F. 2d 838, 840 (1959); *O'Connor* v. *Pennsylvania Railroad Co.*, 308 F. 2d 911, 914 (1962).

Clearly under state law, in view of the decisions above cited, particularly *Tornambe* v. *Tornambe*, the plaintiff's proof in the present case failed to establish sufficient evidence to carry his burden on this issue, and his complaint either should have been dismissed on petitioner's motion at the close of his case (Rec. Vol. I, pp. 243a-245a), or at least a new trial should have been granted since the verdict in the plaintiff's favor was contrary to the evidence on this issue.

Conclusion

The decision herein is in direct conflict with the decision of the Appelllate Division, First Department, Supreme Court of the State of New York rendered on November 19, 1964 in the case of *Moran* v. *Abercrombie & Fitch Company*, 22 A. D. 2d 779, 254 N.Y.S. 2d 33, involving an

injury by falling into the shaft of an elevator installed in 1917 when the door was opened, as here, by the use of a key, and the car was not at the landing.

It is abhorrent to the *Erie* doctrine that "the accident of a suit by a non-resident litigant in a federal court instead of in a state court a block away" should lead to a substantially different result; for, in enforcing a state-created right, a federal court is in substance "only another court of the state." *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 108-109 (1944). See also *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 203 (1955).

The *Erie* rule as stated by this Court in *Hanna* v. *Plumer*, 380 U. S. 460, 467 (1965), "is rooted in part in the realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court."

"It is inadmissible," this Court said, in *Fidelity Union Trust Co.* v. *Field, supra,* at p. 180, "that there should be one rule of State law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the status of diversity of citizenship".

Unless petitioner was accorded a proper and fair trial under New York law, it did not have the benefit of a trial under law at all, for there is no other system or body of law applicable to the determination of its liability herein. In the absence of such a trial, petitioner has been deprived of its property to the extent of a $150,000 judgment without due process of law.

This case is of importance not only to petitioner, although it is submitted that under Rule 19.1(b) of this Court this in itself would be sufficient to justify certiorari, but is also of importance to numerous property owners within the City of New York. The plaintiff's expert, a former supervising inspector of elevators for the New

York City Department of Buildings, testified that there were 50,500 elevators in the Borough of Manhattan alone, and that of these, there are still about 35 percent of the manually-operated type similar to the elevator involved in this case (Rec. Vol. I, pp. 230a-231a). Considering that there are five boroughs within the city, it is apparent that there are a vast number of building owners within the City of New York who can be affected by this decision. By a comparison of the decision of the court in this case with the decision of the Appellate Division, First Department in the case of *Moran* v. *Abercrombie & Fitch Company, supra,* the effect of the present decision is that there will be one rule applicable to non-residents for injuries arising from the maintenance of such elevators and an entirely different rule applicable to residents of the City of New York for such injuries. This is precisely the type of result that the *Erie* rule was designed to prevent.

For the foregoing reasons, this petition for certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

EDMUND F. LAMB,
Attorney for Petitioner.

Dated: New York, New York.
March 28, 1967.

JUVENAL L. MARCHISIO,
On Petition.

APPENDIX A.

Statutes Involved

THE NEW YORK CITY CHARTER

CHAPTER 27

BOARD OF STANDARDS AND APPEALS

* * * * *

§ 666. **Jurisdiction.**—The Board shall have power:

* * * * *

3. To make, amend and repeal rules and regulations for the enforcement of those provisions of the labor law and other laws which relate to the construction, alteration, structural changes in, plumbing and drainage of, elevators in, fire escapes on, adequacy and means of exit from and fire protection in all buildings within the city, which shall take the place of the industrial code and of any rules and regulations of the department of labor of the state of New York relating to the same subject-matter.

4. To exercise exclusively, with respect to buildings situated within the city, the same powers as are exercised by the department of labor of the state of New York elsewhere in the state.

ADMINISTRATIVE CODE OF THE CITY OF NEW YORK

N. Y. Laws of 1937, Chapter 929

TITLE C

BUILDING CODE

ARTICLE 1

GENERAL PROVISIONS

* * * * *

Appendix A.

§ C26-2.0 **Matter covered.**—All matters, affecting or relating to the construction, alteration, demolition, or removal of structures erected or to be erected in the city, are presumptively provided for in this title. This title does not provide presumptively for matters that are contained in the charter, the labor law, the multiple dwelling law, the general city law, the building zone resolution, or in the rules promulgated in accordance with the provisions of this title by the board. This title does not apply to railroads owned by the city, or the title to which is in a board of transit control under the public service law, nor to the stations, yards, shops, power houses, transforming substations, or any other buildings or structures thereof.

§ C26-3.0 **Purpose.**—The purpose of this title is to provide standards, provisions and requirements for safe and stable design, methods of construction and sufficiency of materials in structures constructed, or demolished, after January first, nineteen hundred thirty-eight, and to regulate the equipment, maintenance, use and occupancy of all structures and premises.

ARTICLE 14

Elevators

SUB-ARTICLE 2

Administrative Provisions for Elevators

§ C26-844.0 **Application and scope of this article.**—a. Application.—

1. The construction, maintenance, operation, inspections and tests of elevator, dumbwaiter, escalator or amusement device installations shall be as provided in this ar-

ticle and other applicable sections of this title, and the rules of the board, except as otherwise provided in subdivision c of this section.

• • • • •

c. Existing installations.—

• • • • •

2. Equipment legally installed prior to January first, nineteen hundred thirty-eight may be used without being reconstructed. Such elevators shall be maintained by the owner in a safe operating condition.

SUB-ARTICLE 8

Inspection, Maintenance and Operation

• • • • •

§ C26-1171.0 **Responsibility.**—a. Responsibility of owner. —The owner of the structure, in which an elevator, escalator or dumbwaiter is installed, shall be responsible for the safe operation and proper maintenance of such elevator, escalator or dumbwaiter, after such elevator, escalator or dumbwaiter has been approved by the superintendent.

b. Responsibility for inspection and maintenance.—The owner of the structure, in which an elevator, escalator or dumbwaiter is installed, or his duly appointed agent shall cause periodic inspections to be made of all parts of each elevator, escalator, and dumbwaiter installation. Such owner or agent shall maintain all parts of such elevator, escalator and dumbwaiter installation in proper working order in accordance with the provisions of this title and the rules of the board.

§ C26-1172.0 **Inspection.**—a. All hoistway doors, car gates, interlocks, contacts, control apparatus, controllers,

automatic stops, limit stops, car and counterweight cables, safeties, guide rails, buffers, elevator machines and the lighting of the cars and of the machine rooms, in passenger and freight elevator installations, shall be thoroughly inspected by the superintendent at least four times a year.

N. Y. Laws of 1916, Chapter 503, Sec. 718a.
Jurisdiction

§ 718a. The board shall 1. Have power to test materials to be used pursuant to law, and to make investigations concerning all matters relating to the enforcement and effect of the provisions of this chapter, the building code, and the rules and regulations made by the board;

2. Make, amend and repeal rules and regulations for carrying into effect the provisions of the laws, ordinances and rules and regulations in respect of any subject or matter, jurisdiction whereof is conferred upon the board by this act, or upon a superintendent of buildings by title two of chapter nine of this act or by ordinance or upon the fire commissioner by title three of chapter fifteen of this act or by ordinance, and to include in such rules and regulations provisions applying to specific conditions and prescribing means and methods of practice to effectuate such provisions and for carrying into effect the powers of the board. Such rules and regulations shall take the place of rules and regulations made by a president of a borough, a superintendent of buildings or the fire commissioners;

3. Make, amend and repeal rules and regulations regarding the enforcement of those provisions of the labor law and other laws which relate to the construction, alteration, structural changes in, plumbing and drainage of, elevators, fire escapes on, adequacy and means of exit from and fire alarm systems in all buildings, except tenement houses, within the city of New York.

All rules and regulations made by the board pursuant to this section, shall take the place of the industrial code and of any rules or regulations of the labor department relating to the same subject matter;

4. Exercise exclusively with respect to buildings situated in the city of New York, the same powers as are conferred upon the industrial commission by chapter seven hundred nineteen of the laws of nineteen hundred and fifteen.

* * * * * *

LABOR LAW

§ 255. **Elevators and hoistways.**

In all factory buildings, every elevator and elevator opening and the machinery connected therewith and every hoistway, hatchway and well-hole shall be so constructed, guarded, equipped, maintained and operated as to be safe for all persons; the board shall adopt rules to carry into effect the provisions of this section.

APPENDIX B.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 138—September Term, 1966.

(Argued November 2, 1966 Decided January 4, 1967.)

Docket No. 30668

ESKIL L. KARLSON,

Plaintiff-Appellee,

305 EAST 43RD STREET CORPORATION,

Defendant-Appellant.

Before:

MEDINA, FRIENDLY and SMITH,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, John F. X. McGohey, *Judge.*

305 East 43rd Street Corporation appeals from a judgment entered upon the verdict of a jury in an action to recover damages for personal injuries suffered by Eskil L. Karlson when he fell down an elevator shaft in a building owned and controlled by appellant. No opinion below. Affirmed.

Appendix B.

CHARLES F. KRAUSE, New York, N. Y. (Speiser, Shumate, Geoghan & Krause, New York, N. Y., on the brief), *for plaintiff-appellee.*

EDMUND F. LAMB, New York, N. Y. (William E. Fay, III and Purdy, Lamb & Catoggio, New York, N. Y., on the brief), *for defendant-appellant.*

MEDINA, *Circuit Judge:*

A New York corporation, owner of a building in New York City, appeals from a judgment entered upon a verdict in the amount of $150,000 after the trial before Judge McGohey of an action for damages for personal injuries suffered by Eskil L. Karlson, a Connecticut commuter, as the result of a fall into an elevator shaft. Jurisdiction is based on diversity and New York law governs throughout.

While the building owner claims that Karlson was guilty of contributory negligence and various miscellaneous errors are charged, the principal contention in our view of the case relates to the law applicable to the maintenance of a safety device to prevent access to the elevator shaft when the car is not at the landing. As we find no merit in any of these contentions we affirm.

Karlson was an employee of Haskins Laboratories which had its office in a five-story building in Manhattan owned by appellant, 305 East 43rd Street Corporation. The building contained a single, manually operated elevator that had been in use since its installation in 1920 without significant alteration. During business hours appellant supplied an operator but at other times, with some exceptions, occupants of the building were forced to walk up the stairs.

Because employees of Haskins frequently were in the building on weekends, some few of them sought and ob-

tained permission to operate the elevator themselves. Although Karlson was not included in this group, he learned how to use the elevator from appellant's operator, as apparently had most other Haskins employees, and it was his habit to use the elevator when he was in the building on Sundays.

On previous Sundays Karlson came to the street door, opened it with a key he had been given for the purpose, closed the street door and found himself in a vestibule facing and about 10 or 12 feet from the closed solid doors to the elevator shaft. There was a large three-panelled glass transom above the street door and this provided sufficient light for him to see what he was about but he did not think he "could read a paper in there." There was an electric light fixture overhead but he had never seen it lighted on other Sundays and he had not been shown where the switch was to turn on this light. He then walked over to the stairway and picked up the key to the elevator that was customarily kept under the bottom step, in accordance with instructions previously given to him by employees of the building, and he used this key to open the closed solid doors leading to the elevator. He pulled out the door to his right, then leaned over and reached inside to turn on the light in the elevator. The light switch was in the car at about knee level. He then put the key back under the stairs, entered the elevator car that was always there at the landing, turned on the power, closed the folding gate and ran the car up to the fifth floor where his research laboratory was.

On October 8, 1961 he arrived at the building at about one o'clock in the afternoon and did just what he had done on the earlier Sundays. But on this occasion Robert Epstein, also a Haskins employee, had already run the elevator car to one of the upper floors and he had put the key back under the stairs. Expecting to find the elevator car at the landing, Karlson got the key from under the

stairs, opened the door leading to the elevator, reached forward to turn on the light and fell headlong into the shaft. If the door had been equipped with an interlocking device it could not have been opened unless the car was at the landing.

I.

In his instructions to the jury Judge McGohey said:

> The statute of the State of New York provides—and this is a quotation: "In all factory buildings every elevator and elevator opening and the machinery connected therewith, and every hoistway, hatchway and well hole shall be so constructed, guarded, equipped, maintained and operated as to be safe for all persons; the Board shall adopt rules to carry into effect the provisions of this section."
>
> Under the authority of this statute which I have just quoted the State Board of Standards and Appeals has adopted the following rule: "All manually operated hoistway doors shall be provided with an interlock or electrical contact or other approved devices performing similar functions."
>
> The function of the interlock is defined in another provision as follows: "An interlock is a device which shall prevent the opening of a hoistway door or doors from the landing side unless the car is standing at that landing."
>
> * * * * *
>
> Now, if you find that the defendant violated any of the foregoing provisions such violations would constitute evidence of negligence and you may consider it as evidence of negligence.

If this was error we must remand for a new trial, even if there was other proof from which the jury might have

inferred negligence on the part of the building company. This is not only because the verdict was probably based on the failure to provide an interlock as at least the most likely of possible causes of the accident, but because there is surely nothing to give assurance that the verdict was not based on the failure to provide an interlock. If, instead of laboring the other acts of alleged negligence, appellee had performed the task of thorough research into the background of state laws, New York City Charter provisions and the ordinances and regulations promulgated by a variety of State and City administrative bodies or agencies, as we have been required to do, appellee's brief would have been more helpful to us.

Appellant argues that the above-quoted rule of the State Board of Standards and Appeals is not applicable to elevators located within the City of New York because exclusive jurisdiction over such elevators is lodged in the City Board of Standards and Appeals by virtue of the New York City Charter. The resolution of this question requires extensive analysis of the historical development and interrelationship of various statutes, City ordinances and regulations passed from time to time for the purpose of making elevators and the operation thereof safe in buildings situated in the City of New York.

In 1916 the New York State legislature, by means of an amendment to the Greater New York Charter, established a City Board of Standards and Appeals. The jurisdiction of this Board included the power to "Make, amend and repeal rules and regulations regarding the enforcement of those provisions of the labor law and other laws which relate to the construction, alteration [and] structural changes in * * * elevators * * * within the city of New York." The statute further provided: "All rules and regulations made by the board pursuant to this section, shall take the place of the industrial code and of any rules or regulations of the labor department relating to the same subject matter." N. Y. Laws, 1916, chap. 503, Section 718-a.

In granting the City Board of Standards and Appeals this authority, it is clear that the application of state statutes in the City of New York was not automatically terminated but that the City by affirmative act could but was not required to preempt state regulation. When the City first undertook to regulate elevators in 1918, it did so by incorporating state law.

> Every elevator * * * within the City of New York, in addition to conforming to all provisions of the labor law, building code or other laws or ordinances as are applicable thereto, shall comply with the provisions of these rules. 3 Bull. Board of Standards & Appeals 955 (1918).

Not until 1931 did the City itself undertake comprehensive regulation.

In 1923, however, pursuant to the authority granted to it by the State Labor Law, the State Board of Standards and Appeals adopted regulations requiring all elevators, with exceptions not here relevant, to be equipped with interlocking devices. New York State Industrial Code § 420 (f). As these regulations must be deemed a part of the Labor Law insofar as they establish rules governing the maintenance of elevators, this particular State rule requiring interlocking devices became applicable to the elevator in 305 East 43rd Street, New York City, on its effective date, March 1, 1923. Thus from 1923, the elevator involved in this accident was operated in violation of the applicable regulations.

The question then is whether any later action by the City had the effect of dissolving these violations and of reducing the standards for the safe operation of elevators in the City of New York. The 1931 revision by the City Board of Standards and Appeals provided that elevators "legally installed prior to the adoption of these Rules may

be used without being reconstructed to comply with these Rules." When this particular elevator was installed in 1920 it conformed to the then existing law. But we do not believe the word "installed" in the 1931 revision should be read to mean the date of construction. Such a reading would lead to the absurd conclusion that all elevators located within New York City were governed by the various rules in effect on the date of their construction. Rather, we think that by the use of the word "installed," the draftsman intended to refer to the legality of the elevator as of 1931. That is to say, the regulation should be read as "elevators legally installed and maintained" prior to 1931 may be used "without being reconstructed." To hold the contrary would wipe out eight years of continuous violations in this very building and reduce the safety standards applicable to this class of elevators. A result so unusual could be supported only if there was before us clear proof that the City Board of Standards and Appeals intended such a result. No such proof, however, has been forthcoming and our research has found none.

The current New York City regulations are contained in the Administrative Code of 1938. The provisions of this codification, similar to the 1931 regulations, apply only prospectively. Elevators "legally installed" may be used without change. As this provision parallels that contained in the 1931 regulation, it must be similarly construed.

Thus there is nothing which excludes the application of the State Labor Law and the regulations adopted pursuant to that law require that the elevator involved in this suit be equipped with an interlocking device. Judge McGohey's charge was proper.

Appellant argues that Section 666 of the New York City Charter confers upon the City Board of Standards and Appeals exclusive jurisdiction over elevators within the City of New York, and that, therefore, no State law or regulation could apply. Apparently, appellant was un-

aware of the 1918 City regulation which incorporated State law. All subsequent City enactments continued this incorporation, as we have shown.

II.

Appellant further complains of the admission of evidence that immediately following Karlson's accident appellant installed an interlocking device. Under both New York and federal law such evidence is admissible only if it bears on a disputed issue of control. *Hadges* v. *New York Rapid Transit Corp.*, 259 App. Div. 154, 18 N. Y. S. 2d 304; *Columbia & P. S. R.R.* v. *Hawthorne*, 144 U. S. 202 (1892); see 2 Wigmore, Evidence § 283(4). Whether and to what extent, any issue of control remained in the case by the time of trial is unclear.

In its answer, appellant did not admit that it controlled the elevator or, more specifically, it denied that it controlled the elevator on the day of the accident. In the pre-trial order, it was agreed that "no amendments to the pleadings are allowed" and that "no issues raised by the pleadings are abandoned." Appellee, both to meet the issue of control and to show the scene of the accident, put in evidence a photograph of the elevator taken after the safety lock was installed. See 2 Wigmore, Evidence § 283(4). While the device was open to the view of anyone looking at the photograph, including any juror familiar with such matters, no comment on the subject was made by either counsel at the time the photograph was received in evidence. Later during the trial when appellee sought to bring up the question of repairs, appellant strenuously objected. Appellant argued there was no issue of control in general framed by the pleadings but only of control on the day of the accident and further that in the pre-trial order it had conceded that it "maintained" the elevator. Counsel for appellant then insisted he had no intention to dispute the issue of control.

Appendix B.

Judge McGohey concluded that the appellee should be permitted to prove and to explain the presence of the safety device to prevent adverse and unwarranted inferences by the jury. We think appellant is chargeable with much of the confusion surrounding this issue of control and should have objected to the photograph when it was offered in evidence if it wished to keep the evidence of repairs from the jury. Moreover, when the evidence of the installation of the interlock was received, Judge McGohey instructed the jury that they must restrict their consideration of this evidence to the limited issue of control, which was also explained to the jury, and that no other inferences might be drawn. Under the circumstances of this case we think this was sufficient.

We think the issue of contributory negligence was clearly for the jury to determine. Nor was there error in the instructions on the subject of causation. No particular formula is required. Other claims of alleged error have been considered by us but we find them devoid of merit.

The verdict is large but not so large as to give us the impression that a reversal or remittitur is necessary to prevent a gross miscarriage of justice. *Dagnello* v. *Long Island R.R. Co.*, 289 F. 2d 797 (2 Cir. 1961).[1] The proofs show permanent physical injuries including a permanent impairment of memory and ability to communicate. Karlson is a physicist with a life expectancy of about thirty years. The jury might well have concluded that his earning capacity, which was superior prior to the accident, had been substantially reduced.

Affirmed.

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[1] As remittitur concerns the relationship between the federal judge and jury, it is a question of federal law. *Byrd* v. *Blue Ridge Rural Electric Cooperatives, Inc.*, 356 U. S. 525 (1958).

APPENDIX C.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of January, one thousand nine hundred and sixty-seven.

Present: HON. HAROLD R. MEDINA,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

ESKIL L. KARLSON,
Plaintiff-Appellee,

v.

305 E. 43RD STREET CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

APPENDIX D.

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of February, one thousand nine hundred and sixty-seven.

Present: Hon. Harold R. Medina,
Hon. Henry J. Friendly,
Hon. J. Joseph Smith,
Circuit Judges.

Eskil L. Karlson,
Plaintiff-Appellee,

v.

305 E. 43rd Street Corporation,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro,
Clerk.

APPENDIX E.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of February, one thousand nine hundred and sixty-seven.

Present: HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,
Circuit Judges.

ESKIL L. KARLSON,
Plaintiff-Appellee,

v.

305 E. 43RD STREET CORPORATION,
Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.